STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:	Docket No. 07-AFC-6
Application for Certification for the Carlsbad Energy Center Project	

COMMISSION STAFF RESPONSE TO PETITIONS FOR CONSIDERATION

I. INTRODUCTION

On May 31, 2012, the California Energy Commission adopted the Final Decision for the Carlsbad Energy Center Project (CECP). The Final Decision was docketed and effective on June 1, 2012. The City of Carlsbad (City) filed a Petition for Reconsideration on June 26, 2012. Subsequent Petitions for Reconsideration were filed by two additional parties, Terramar and Power of Vision, on June 27 and June 28, respectively. The Petitions for Reconsideration (Petitions) are timely. (Cal. Code Regs., tit. 20, § 1720, subd.(a).)

II. CRITERIA FOR RECONSIDERATION

The Commission's regulations set forth the requirements for a petition:

> "A petition for reconsideration must specifically set forth either: 1) new evidence that despite the diligence of the moving party could not have been produced during the evidentiary hearings on the case; or 2) an error in fact or change or error of law. The petition must fully explain why the matters set forth could not have been considered during the evidentiary hearings, and their effects upon a substantive element of the decision." (Cal. Code Regs., tit. 20, § 1720, subd. (a).)

The granting of a proper petition is entirely discretionary. (Pub. Resources Code, § 25530.)

III. THE CITY'S PETITION DOES NOT MEET THE REQUIREMENTS OF SECTION 1720, SUBDIVISION (a).

The City's petition raises three issues that suggest changes to the Final Decision. Each of these issues was either raised or could have been raised at the any of the three sets of evidentiary hearings that were held on the CECP project.

A. Development Impact Fees.

The City's first requested change to the Final Decision is that it should include a Condition of Certification "requiring the payment of development impact fees prior to commencement of construction." (City Petition, p. 2.) This issue is not new, and has been discussed at previous hearings, including the May 31, 2012, hearing at which the Final Decision was adopted.

The City correctly points out that it is entitled to reimbursement under Commission regulations for certain costs "incurred in accordance with actual services performed by the local agency, provided that the local agency follows the procedures set forth in [Cal. Code Regs., tit. 20, § 1715]." Such fees include lost permit fees, public facility fees, and other similar fees, but not administrative fees. (*Ibid.*)

Carlsbad Energy Center, LLC (hereafter, Applicant), has disputed the amount of the City's late-filed request for fee reimbursement. Commission staff (Staff) generally supports the City's request that it be reimbursed, but such reimbursement need not, and should not, occur by placing a condition in the decision requiring reimbursement for specific identified costs that Applicant currently disputes. Rather, when there is a dispute over reimbursement of local agencies, such reimbursement is to occur by written order from the Commission. (Cal. Code Regs., § Section 1715, subd. (e).) In the instant proceeding, Applicant and the City should meet in an attempt to resolve the disputed costs. Staff can be invited to mediate disputes. This approach was suggested by Chairman Weisenmiller at the May 31 adoption hearing, indicating that the parties should attempt a negotiated resolution prior to seeking a Commission order. (5/31/12 Tr. pp. 257-259.) Only if resolution cannot be found in this manner should the parties

come back to the Commission for an order regarding disputed costs. The Commission has continuing jurisdiction over this matter and the ultimate authority to resolve it by written order should the necessity arise.

In sum, the issue of fees has been discussed during the proceeding, is not a new issue, and is not appropriately addressed by amending the Final Decision.

B. Revising Condition LAND-1 to Provide a Temporary Coastal Rail Trail.

The City requests a change in the Conditions of Certification that would require Applicant to provide a temporary rail trail through the CECP site until such time as construction of CECP commences. (City Petition, p. 6.) The issue regarding the location of a rail trail, and whether it should be on the CECP project site, is an issue that has been discussed for years during a long proceeding. Applicant and Staff opposed a site location for the trail because of site security and safety issues. Consistent with these objections, the Commission adopted LAND-1, requiring Applicant to pay for a rail trail easement *off* the project site at a location that is mutually agreeable. (Final Decision, p. 8.1-37.)

The only new aspect of the City's request is that a "temporary" rail trail be located on the project site.

The City is in effect disagreeing with an issue already resolved in the Final Decision. The issue is one that could have been, and effectively was, presented at evidentiary hearings. (See, e.g., Exh. 200, pp. 4.5-15, 15 [Staff FSA testimony]; Exh. 433 [City hearing testimony, Donnell, p. 17]; 2/1/10 Tr., pp. 166-167,171-172, 175-176,182-183, 205-207.) The City has presented no new information or change in law that would warrant reconsideration of the matter. Moreover, the Commission's decision is effective when docketed. (Cal. Code Regs., tit. 20, §1720.4.) This means that Applicant has the right to begin site preparation and construction as it chooses in the immediate future, consistent with the filing of required compliance documents. Revisiting the rail trail

issue, and requiring construction of a "temporary trail" on the project site, would be inconsistent with the site control necessary for such construction, whenever it may begin.

C. Revising Condition LAND-2 Requiring Demolition and Removal of the Encina Power Station.

The precise language in condition Land-2 was originally negotiated by the City and Applicant, with encouragement from the Commission committee that presided over the CECP licensing proceeding. It was subsequently an issue at evidentiary hearings, and its final wording is the result of the Commission's extensive hearing process. The City's latest proposal is one that was or could have been raised during evidentiary hearings. The final language of LAND-2 was specifically crafted to encourage rapid removal of existing facilities as their use is discontinued, while at the same time avoiding the creation of a financial burden on Applicant that would make the project impossible to finance. In this context, the issue has been previously considered by the Commission, and the current language in LAND-2 crafted as a result. Reconsideration is inappropriate, and is not in accord with the requirements of Section 1720, subdivision (a).

IV. PETITIONS FROM POWER OF VISION AND TERRAMAR MAY MEET THE REQUIREMENTS OF SECTION 1720, BUT THE ISSUE RAISED HAS BEEN CONSIDERED BY THE COMMISSION.

Tarramar and Power of Vision's petitions are with regard to the City's adoption of Ordinance No. CS-184. The ordinance was apparently adopted by the City two days immediately before the Commission adopted the Final Decision. (City Motion for Official Notice, March 30, 2012, Exh. 1.) The ordinance and its accompanying resolution and brief staff documents comprise a confusing, inchoate, and rhetorical attempt to delay the Commission's adoption by providing that the City's fire department will be the "secondary" response to any emergency at the CECP facility, and the Commission itself the "primary" responder.

The adoption of the ordinance, whatever its actual effect (or lack thereof), could be considered a "change in the law," and therefore arguably within the terms of the requirements of a petition set forth in Section 1720, subdivision (a). Thus, the Commission "may" grant reconsideration based on these petitions. However, Staff recommends that the petitions be denied.

The ordinance was raised to the Commission by the City both immediately prior to and at the final hearing at which the Final Decision was adopted. (*Ibid.*; 5/31/12 Tr. pp. 203, 220, 251, 278.) The City's three-page staff report (initialed by the City Attorney) for the ordinance states that its adoption "does not qualify as a 'project' under the California Environmental Quality Act (CEQA) per Guidelines Section 15378 as it does not result in a direct or reasonable [sic] indirect physical change in the environment." (City of Carlsbad Report for Agenda Bill 20,911, p. 3, dated 5/22/2012 [officially noticed at 5/31/2012 Tr. p. 270].) The quoted language is taken from CEQA Guidelines Section 15378, subdivision (b)(5), describing agency actions that are purely "organizational or administrative," and having no further effect beyond the agency. Thus, the City has described its rather confusing action as having no effect of any importance. The Commission properly judged the action to be a contrived attempt to once more delay the decision, and properly gave little weight to it. The issue does not require or merit reconsideration.

Date: July 2, 2012

Respectfully submitted,

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APPLICATION FOR CERTIFICATION FOR THE *CARLSBAD ENERGY CENTER PROJECT*

Docket No. 07-AFC-6
PROOF OF SERVICE
(Revised 3/27/2012)

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DECLARATION OF SERVICE

I, Pamela Fredieu, declare that on, July 3, 2012, I served and filed a copy of the attached ***Commission Staff Response to Petitions for Consideration,*** dated July 2, 2012. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at: www.energy.ca.gov/sitingcases/piopico/index.html.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

(*Check all that Apply*)

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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

___ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

/s/
Pamela Fredieu
Legal Secretary